No. 73-1186

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In the Supreme Court of the United States

OCTOBER TERM, 1973

TODD G. MOXEY, PETITIONER

v.

EDGAR C. SEELY, JR. AND
SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The judgment-order of the court of appeals (Pet. App. A55-A56) is noted at 485 F. 2d 680. The opinion of the district court (Pet. App. A44-A53) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1973; a timely petition for rehearing was denied on November 7, 1973. The petition for a writ of certiorari was filed on February 2, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the federal courts should review the discretionary decision of military authorities ordering a reservist to active duty as a result of his incurring six unexcused absences.

2. Whether the procedures followed in ordering petitioner to active duty afforded him due process.

3. Whether the availability of alternative methods of dealing with unsatisfactory reservists renders petitioner's activation order invalid.

STATUTE AND REGULATION INVOLVED

10 U.S.C. 673a.

(a) Notwithstanding any other provision of law, the President may order to active duty any member of the Ready Reserve of an armed force who—

(1) is not assigned to, or participating satisfactorily in, a unit of the Ready Reserve;

(2) has not fulfilled his statutory reserve obligation; and

(3) has not served on active duty for a total of 24 months.

Army Regulation 135-91

5*d*. Satisfactory participation is defined as follows:

* * * * *

(2) Attendance at all scheduled unit training assemblies as a member of a paid drill unit of the Army National Guard or Army Reserve, unless excused by proper authority as provided herein.

A member present at a scheduled unit training assembly will not receive credit for attendance thereat unless he is in the prescribed uniform, presents a neat and soldierly appearance, and performs his assigned duties in a satisfactory manner as determined by the unit commander. When a member attends a unit training assembly and does not receive credit therefor, he will be charged with an unexcused absence and the unit commander will follow the same procedures applicable when a member fails to attend a unit training assembly.

* * * * *

12. *Unexcused absences from unit training assemblies.* A member fails to participate satisfactorily when he accrues in any 1-year period a total of five or more unexcused absences from scheduled unit training assemblies * * *.

STATEMENT

Petitioner, an Army Reservist, was ordered to active duty for failing to participate satisfactorily in his unit by incurring six unexcused absences within a one-year period.

Petitioner enlisted in the Army Reserves in 1966, and subsequently signed a "Statement of Reserve Agreement Understanding" which stated, *inter alia,* that he understood that he was subject to being ordered to active duty for failing to attend unit training without proper authority, and that a member attending a unit training assembly may not receive credit for attendance if he is not in the prescribed uniform as determined by the unit commander (Pet. App. A44-A46).

On January 10, 1971, petitioner was absent from two scheduled training assemblies of his reserve unit, allegedly because of a severe cold. On the same day, the Reserve Unit sent him a letter advising him of his unexcused absences, informing him of the method to be followed to have the absences authorized, and informing him that the next Reserve meeting was to be held on the weekend of February 13 and 14, 1971. Although petitioner attended this meeting, he was credited with four unexcused absences for appearing in a uniform which his commanding officer determined to be improper. As a result of incurring six unexcused absences within a one-year period, petitioner was ordered to active duty.

Petitioner appealed this order under Army Regulation 135-91. Although he did not appeal through his unit of assignment as he was instructed to do (Pet. App. A6), his appeal was considered and denied by each level up to and including the Delay Appeal Board.

Petitioner thereupon sought review of his activation orders in the district court, claiming that he should not have been activated because his absences due to illness should have been excused and he was denied due process in the Army proceedings which resulted in his activation orders. The district court held that petitioner had been properly activated and granted summary judgment for the government (Pet. App. A44-A53). On appeal, the Third Circuit affirmed, 458 F. 2d 680 (Pet. App. A55-A56).

ARGUMENT

The decision of the court of appeals is correct and no issue warranting further review is presented.

1. It is well settled that the federal courts will not review discretionary decisions of the military

authorities made within their proper jurisdiction. *Orloff* v. *Willoughby*, 345 U.S. 83. Both acts complained of here—awarding petitioner six unexcused absences and ordering him to active duty—are within the jurisdiction of the military. See *O'Mara* v. *Zebrowski*, 447 F. 2d 1085 (C.A. 3); *Keister* v. *Resor*, 462 F. 2d 471 (C.A. 3), certiorari denied, 409 U.S. 894.

10 U.S.C. 673a provides that a member of the Reserves who is not participating satisfactorily in his Reserve unit may be ordered to active duty. Army regulations issued pursuant to that section provide that the unit commander is to decide whether the reservist is participating satisfactorily and that a reservist is not participating satisfactorily unless he is in the prescribed uniform, AR 135-91(5)(d)(2). They further provide that accural of five or more unexcused absences from scheduled unit training assemblies in a one-year period constitutes unsatisfactory performance, AR 135-91(12).

Moreover, even though the Army's actions complained of are discretionary and not subject to review by the courts, they were plainly correct. Petitioner contends that his absences due to illness should have been excused. However, petitioner failed to follow the applicable regulations in obtaining excuses.

A unit directive allows members who are too ill to attend a training session to telephone the unit and obtain a medically excused absence (C. A. App. 16a). Although petitioner did make one attempt to telephone his unit, nothing in the directive excuses him from actually reporting his illness as opposed to attempting to report it. Moreover, the letter informing petitioner of his unexcused absences set out the procedure to be

followed to obtain excused absences, *i.e.*, submission of affidavits or medical certificates within 14 days of the absence. Petitioner failed to do anything about the absences until 34 days after the absence (Pet. App. A10-A11).

Likewise, the decision to award four unexcused absences for the drills at which petitioner appeared without the proper uniform was within the commander's discretion and was correct. Petitioner was notified by mail following his first two absences of the date of the next drill. His excuse that his uniform was at the cleaners because he was not aware of the date of the training assembly is thus clearly insufficient.

2. Petitioner's other claims are similarly without merit.

Petitioner was not entitled to a hearing under AR 15-6 in his appeal of his orders to active duty. AR 135-91, paragraph 20, under which petitioner claims the right to a hearing, was amended by a Department of the Army message dated November 13, 1970 (Pet. App. A61-A62), prior to petitioner's appeal in February of 1971. This change was later incorporated in AR 135-91, Change 9, effective June 1, 1971. The message change of November 1970 was clearly competent to accomplish the change in regulation. See *Pifer* v. *Laird,* 328 F. Supp. 649 (N.D. Cal.), followed by *Cobb* v. *Laird,* 329 F. Supp. 780 (N.D. Cal.). Petitioner's construction of the language of the message is unsound. No message change would have been issued had the Army only announced a proposed change. Indeed, the third paragraph of the message announces that the changes "are effective immediately" (Pet. App. A62).

Moreover, denial of a hearing before the appeal board, unless provided by the regulations, is not a denial of due process. *Keister* v. *Resor, supra; O'Mara*

v. *Zebrowski, supra; Crotty* v. *Kelly*, 443 F. 2d 214 (C.A. 1); *Ansted* v. *Resor*, 437 F. 2d 1020 (C.A. 7), certiorari denied, 404 U.S. 827. Petitioner voluntarily joined the Army Reserves and understood he was subject to activation if he did not participate satisfactorily in his unit's duties (Pet. App. A44-A46).

Nor do the other alleged infirmities amount to a denial of due process. Both *Gonzales* v. *United States*, 348 U.S. 407, and *Crotty* v. *Kelly*, 443 F. 2d 214 (C.A. 1), involved the determination of whether the plaintiffs were entitled to conscientious objector status, a question which appropriately has been given closer scrutiny than the activation of reservists. Once an individual has voluntarily elected to fulfill his military obligation by enlisting in the Reserves, the only demand of due process is that the Army comply with its own regulations, *Keister* v. *Resor, supra*, 462 F. 2d at 474. Petitioner here makes no claim that the Army failed to follow its own regulations in denying petitioner access to documents in his file. Accordingly, the Army's procedure here was properly upheld.[1]

3. Finally, the availability to the Army of other methods of dealing with unsatisfactory reservists does not render involuntary activation unconstitutional. It is well settled that involuntary activation of a reservist for unsatisfactory performance is not cruel and unusual punishment. See *Keister* v. *Resor, supra; O'Mara* v. *Zebrowski, supra; Fox* v. *Brown*, 402 F. 2d 837 (C.A. 2). The availability of other methods for dealing with an unsatisfactory reservist is irrelevant. Activation of a reservist for unsatisfactory

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[1]Petitioner's contentions that the appeal board failed to give the appeal meaningful consideration, and that it issued "canned" findings are without merit. The allegations, totally unsupported by facts are insufficient to overcome the presumption of regularity which must be accorded such proceedings.

performance is authorized by statute. 10 U.S.C. 673a. The determination as to what action should be taken to deal with an unsatisfactory reservist lies within the discretion of the military. See *e.g., Orloff* v. *Willoughby, supra; Keister* v. *Resor, supra; O'Mara* v. *Zebrowski, supra; Bluth* v. *Laird,* 435 F. 2d 1065 (C.A. 4); *Byrne* v. *Resor,* 412 F. 2d 774 (C.A. 3).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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